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No. 84-510 (2)

In The
Supreme Court of the United States
October Term, 1984

ASPEN SKIING COMPANY,
Petitioner,
vs.
ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE

1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

Attorneys for Respondent

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QUESTION PRESENTED

Whether the Court of Appeals' determination that there was sufficient evidence for the jury to conclude that Petitioner's conduct as a whole, including its refusal to participate in the sale of a four-mountain ski-lift ticket, constituted monopolization in violation of § 2 of the Sherman Act either (a) raises any important questions of federal law which have not been, but should be, settled by the Supreme Court; or (b) is in conflict with the decision of any other federal court of appeals on the same matter.

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STATEMENT OF THE CASE

Respondent, Aspen Highlands Skiing Corporation ("Highlands"), must emphasize to this Court that *certiorari in this matter is being sought to review a determination by the Tenth Circuit Court of Appeals that sufficient evidence was presented in the trial of this action to support a jury's general verdict of monopolization.* Because sufficiency of the evidence would also have to be considered by this Court were certiorari to be granted, Highlands therefore presents its own Statement of the Case to review the procedural posture of this matter and alert the Court to the evidence omitted or misstated in the selective recitation presented by Petitioner, Aspen Ski Co. ("Ski Co."), in its cursory Statement of the Case.

Contrary to the assertion made at page 3 of the Petition for Certiorari, the focus of this case was far broader than "Highlands' contention that Ski Co. was obligated to cooperate with Highlands in jointly offering certain ski-lift tickets to the public." In its petition, at page 4, Ski Co. asserts that the "alleged refusal by Ski Co. to join with Highlands in offering a joint ticket was the basis of Highlands' claim of monopolization under § 2 of the Sherman Act." This assertion is surprising in view of Ski Co.'s strenuous argument on appeal that Highlands' monopolization claim was premised on six separate theories of liability. See Appendix to Petition, pp. 12a-13a.[1]

Ski Co.'s single-focus assertion is also erroneous in that it glosses over the evidence and ignores what the

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[1] The decision of the Tenth Circuit Court of Appeals in this matter is reprinted as an Appendix to the Petition herein. For the Court's convenience, citations in this Brief to the decision have been made to the pages as set forth in the Appendix.

Court of Appeals concluded in reviewing the monopolization claims. The Court concluded "that there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, *considered together with its other conduct,* showed its intent to create or maintain a monopoly and thus a violation of § 2." Appendix to Petition, p. 23a (emphasis added). Any review on certiorari would therefore have to include a consideration of *all* the evidence presented to the jury concerning Ski Co.'s varied conduct. That evidence was extensive but must be summarized here for a proper appreciation of the question actually decided by the jury and reviewed by the Court of Appeals.

A. The Ski Industry In Aspen

The ski industry in Aspen, Colorado, began in 1945 when Aspen Skiing Company ("A.S.C.") was formed to develop Aspen Mountain, an area appealing mainly to expert skiers. In 1958, in an effort to develop a more balanced ski mountain, Whipple Van Ness Jones founded Highlands and began the development of the ski area there. In that same year, several individuals formed Buttermilk Mountain Skiing Corporation ("Buttermilk") and embarked upon the development of the Buttermilk area as a teaching mountain for beginners. Thus by the early 1960's there were three separate corporations offering downhill skiing services in the Aspen area. In 1962, to make this multimountain aspect of Aspen more readily accessible to consumers, the companies began offering to the public a multi-day, coupon-type ticket that allowed the skier to exchange a coupon for a daily lift ticket at any one of the areas. In 1963 A.S.C. acquired Buttermilk as a wholly-owned subsidiary through a stock exchange. In 1965 the Janss Corporation obtained a permit from the United States Forest Service for the development of a ski area in the Snowmass area, adjacent to Aspen. Subsequently, the Janss Corporation entered into a joint venture with A.S.C. for the development of this area and in 1967 the Janss Corporation assigned all of its rights in the permit to the Snowmass Skiing Company, which was formed as a wholly-owned subsidiary of A.S.C. Thus, A.S.C., the predecessor of Ski Co., amassed its monopoly power over ski facilities in Aspen through a pattern of acquisition of competitors and potential competitors.

B. The Four-Area Ticket

In the early 1960's, Highlands and Ski Co. began promoting and marketing a multi-day, coupon-type ticket that could be used to obtain ski lift services at either of the areas operated by the two parties. By the end of the 1960's, after Ski Co. had acquired Buttermilk and Snowmass, the multi-area ticket afforded the skier an opportunity to choose among all four of the areas at Aspen in deciding where to ski on any particular, day. Also, by the end of the 1960's, this multi-area ticket had evolved into a six-day package in recognition of the fact that most skiers came to Aspen for a week-long stay. Although Ski Co. offered its own three-area, multi-day ticket at this same time, the four-area ticket was far more popular.

In 1973, the parties introduced a four-area, six-day ticket in a new format—a card that could be worn on a string around the neck and be punched for each day that it was used for skiing. Because there were no coupons or other physical evidence to show where the holder of a multi-day, multi-area ticket had skied on a particular day,

it was necessary to implement a new system for determining the usage of the four-area ticket so that revenues from its sale could be properly allocated between Highlands and Ski Co.

The parties developed a survey procedure to measure actual usage of each mountain by the four-area ticket holders. The percentage of use for each area arrived at from this count was then used to determine how much of the revenue from four-area ticket sales would be received by Highlands and Ski Co. The percentages earned by Highlands under this system were 17.5% for 1973-74, 13.5% for 1974-75, 16.8% for the 1975-76 ski season and 13.2% for the 1976-77 ski season, a year in which snowfall was unusually sparse and attendance at ski areas throughout the state was markedly lower than average.

After the 1976-77 ski season, D.R.C. Brown, President of Ski Co. and of its subsidiaries, unsuccessfully attempted to convince the Board of Directors of Ski Co. to terminate the four-area lift ticket. Thereafter, Mr. Brown decided that Highlands should be offered a fixed-percentage share of the revenues from the sale of the four-area ticket during the upcoming 1977-78 ski season, rather than a percentage determined by the usage survey. Thus, Ski Co. offered to continue participation with Highlands in the sale of a four-area ticket only on the condition that Highlands accept a fixed 13.2% of the revenues, its share from the previous, low-snow year. Highlands protested and sought to obtain some agreement whereby revenues would be divided on the basis of actual usage at the various areas.

Finally, when no such agreement appeared to be forthcoming, Highlands agreed to accept a fixed 15% of the rev-

enues with the hope that the four-area ticket would at least be kept alive and that a new usage-based allocation system could be agreed upon for the following year. Also in 1977-78, Ski Co., for the first time since the 1972-73 ski season, marketed and sold its own three-area, six-day ticket, which was valid only at Aspen Mountain, Buttermilk and Snowmass. Again in 1978, though some members of management opposed the idea, Mr. Brown recommended to the Ski Co. Board of Directors that they cease their participation in the four-area ticket for the upcoming season. The discussion at the board meeting centered on alleged problems with the surveys that had been used to determine each company's share of revenues.[2] The Ski Co. board decided to offer Highlands a flat 12½% of revenues of four-area ticket sales, which at least one board member admitted was an offer that Highlands would have to refuse. Highlands rejected this offer as an unfair proposal that took away all incentive and ability for Highlands to compete to attract customers to its mountain. Highlands pursued negotiations in an attempt to arrive at a compromise that would allow continuation of a four-area ticket with revenues allocated on the basis of actual usage. Ski Co. re-

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[2] In its Petition, Ski Co. adverts to a suit filed in 1975 by the Attorney General of Colorado and implies that that action challenged and had some impact on the continued marketing of the four-area ticket. That suit challenged a broad array of practices; its only reference to "multi-area" tickets had to do with the fixing of prices for such a ticket. The consent decree settling that action, entered in August, 1977, expressly authorized the continued marketing of joint lift tickets provided that certain standards concerning pricing of those tickets were adhered to for a period of five years. The suggestion that the state antitrust suit was responsible for the discontinuation of the four-area ticket is both contrary to the evidence and at-odds with the jury's rejection of Ski Co.'s business justification defense.

jected all these compromise attempts. Consequently, for the 1978-79 ski season, there was no four-area ticket offered to the public, although Ski Co. continued to promote and market its own three-area, six-day ticket.

C. The Effect Of Ski Co.'s Termination Of The Four-Area Ticket and Subsequent Conduct

The elimination of the four-area ticket and the actions of Ski Co. in connection with and subsequent to that elimination had a devastating effect on Highlands and on consumers. During the 1970's the parties had cooperated in marketing the resort of Aspen, stressing the ambiance of the town and the availability of four mountains of varied skiing. After 1978, Ski Co. continued marketing efforts that sought to capitalize on the appeal of Aspen as a resort, but now they gave the clear impression that Aspen was comprised of only the three mountains owned and operated by Ski Co. Ski Co.'s efforts in this regard included unilaterally changing a sign at Stapleton Airport in Denver (erected previously with funds supplied in part by Highlands), to eliminate its reference to four mountains, and producing advertisements that placed a Buttermilk label over a picture of Highlands. First-time visitors to Aspen, who comprise 20% to 25% of skiers annually, thus could easily have purchased Ski Co.'s three-area, six-day ticket in the mistaken belief that they were thereby securing access to all of the skiing in Aspen. Return visitors to Aspen frequently bought Ski Co.'s three-area, six-day ticket, assuming that it was the multi-area ticket with which they were previously familiar, only to be sorely disappointed when they discovered that the ticket could not be used at Highlands.

In an effort to compete with the three-area, six-day ticket and to continue to offer a four-mountain capability

to skiers who sought the purchase of a convenient multi-day ticket, Highlands attempted to develop and promote to skiers its own multi-area, six-day package, the Adventure Pack. Highlands initially sought to purchase single-day lift tickets from Ski Co. and include those tickets in the Adventure Packs sold to skiers, who could then use those tickets to ski at Ski Co. mountains during a portion of their week-long visits to Aspen. Ski Co. refused to sell its tickets to Highlands. Highlands then attempted to provide its customers access to Ski Co. mountains by including vouchers in its Adventure Pack. The vouchers were secured by funds deposited in a local bank and were designed to be exchanged by skiers for a daily lift ticket at any of the Ski Co. mountains and then redeemed by Ski Co. for the full daily lift ticket price in cash. Ski Co. refused to accept the vouchers. Finally, Highlands put together an Adventure Pack that included twenty-dollar travelers checks that skiers could use to purchase daily lift tickets from Ski Co., which at the time sold for twenty dollars. In response, Ski Co. raised its daily lift ticket price to twenty-two dollars, making travelers check usage impractical and the Adventure Pack economically unmarketable. With Ski Co.'s repeated refusals to cooperate, Highlands was unable to make skiing at Ski Co. mountains readily available to purchasers of the Adventure Pack and was seriously disadvantaged in its ability to attract destination skiers seeking to purchase convenient multi-mountain skiing capability.

From 1978 onward, in addition to its efforts with the Adventure Pack, Highlands sought to reestablish the four-area ticket and proposed various alternatives to Ski Co. that would permit the allocation of revenues on a usage basis without imposing the "burden" of surveys on Ski

Co. One such alternative that was proposed was a return to a coupon system such as had been used in Aspen during the 1960's. This proposal was rejected by Ski Co. as unacceptable, despite the fact that at that very time another Ski Co. subsidiary (controlled by the same common Board of Directors and management), Breckenridge Skiing Corporation, was participating in an identical joint four-area coupon ticket in Summit County, Colorado, an area where Ski Co. did not possess monopoly power.

As a result of the elimination of the four-area ticket, a large proportion of skiers coming to Aspen did not ski at Highlands, although they would have liked to, because their lift tickets were not valid there. Lift ticket sales at Highlands dropped precipitously in the 1978-79 season and declined even further in subsequent seasons.[3] Moreover, participation in the Highlands' Ski School and in NASTAR races at Highlands, activities typically pursued by the vacationers as opposed to the local skier, declined at an even greater rate. This continuing injury prompted the present suit.

D. Court Of Appeals Review Of The Sufficiency Of The Evidence

At trial Ski Co. argued that its refusal to cooperate with Highlands could not be an act of monopolization if such refusal was motivated by valid business reasons.

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[3] Highlands could not effectively compete for the business of skiers who purchased three-area, six-day tickets from Ski Co. For such skiers to ski at Highlands would require them either to forego one day of skiing they had already purchased from Ski Co. and purchase an additional day from Highlands or to seek a refund under a refund policy that Ski Co. did nothing to publicize, and thereby give up the discount that they had obtained when they purchased the three-area, six-day ticket.

Upon the close of Highland's case and again at the end of the trial, Ski Co. moved for a directed verdict. Neither of these motions mentioned as an issue the sufficiency of the evidence to prove an act of monopolization. The jury received adequate instruction on the issue of monopolization, *drawn largely from the instructions proposed by Ski Co.* For example, the jury was instructed in part that:

> a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

A complete copy of the trial court's jury instruction concerning monopolization, as well as Ski Co.'s proposal on this issue, are included herein as Appendix A and B, respectively. The jury returned a general verdict finding that Ski Co. had "willfully acquired, maintained, or used monopoly power by anticompetitive or exclusionary purposes rather than primarily as a consequence of a superior product, superior business sense, or historic accident." The Court of Appeals held that the evidence referred to above was sufficient to support this verdict and affirmed.

On appeal, despite having proposed the instruction on refusal to cooperate and the issue of legitimate intent, Ski Co. argued that intent was an improper, irrelevant concept and that a refusal to cooperate could not constitute monopolization *under any circumstances.*[4] In connection

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[4] In response to Ski Co.'s attempt to obtain appellate review of this issue, Highlands argued that Ski Co., not having challenged the sufficiency of the evidence with respect to monopolization in its motion for directed verdict, had no right to such review. Rule 50(a), F.R.C.P.; *see Martinez Moll v. Levitt &*

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with this argument and because its appeal was presented as a challenge to the sufficiency of the evidence, Ski Co. conceded its failure to prove any business justification for its refusal to deal with Highlands.[5] In response to this argument, the Court of Appeals examined the theoretical aspects of a refusal to cooperate, analogizing to cases examining such a refusal in the context of either essential facilities or anticompetitive purpose, and held, under the

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Sons of Puerto Rico, Inc., 583 F.2d 565, 568 (1st Cir. 1978). The Court of Appeals, apparently considering the motions to have been adequate, ruled there had been no waiver and considered the merits of Ski Co.'s monopolization argument. Obviously, if certiorari is granted in this matter, Highlands will renew its position that Ski Co. is not entitled to any review on the monopolization issue. Permitting such review has already had the untoward result of allowing Ski Co. to try its case, with the instructions it proposed, before the jury on one legal theory and then, having failed in that endeavor, to try its case again before the Court of Appeals on an entirely new theory.

[5] At trial Ski Co. urged that its refusal to continue with a four-area ticket, dividing revenues on the basis of usage, and its refusal to cooperate with Highlands' efforts to develop the Adventure Pack were motivated by legitimate business reasons. Because the jury, by finding for Highlands on the question of monopolization, rejected this defense, Ski Co. did not pursue it on appeal:

> The jury, on the evidence, could reasonably have accepted [Highlands'] view that [Ski Co.] abandoned the joint ticket not as the result of a failed negotiation, but rather with intent and design not to cooperate at all with [Highlands] in the marketing of a joint ticket. In this appeal, therefore, [Ski Co.'s] position is that even if it abandoned the joint ticket as a conscious and unequivocal refusal to cooperate with [Highlands] in the marketing of their respective facilities, it committed no antitrust violation.

Brief of Defendant-Appellant, pp. 7-8. Thus, the business justification defense was not considered on the appeal and the Court of Appeals review of the evidence necessarily included the implicit assumption that Ski Co. had no legitimate business reason for its refusal to cooperate. See Appendix to Petition, p.4a, fn.2.

circumstances presented here, a refusal to cooperate, coupled with Ski Co.'s other exclusionary and anticompetitive conduct, was sufficient to constitute monopolization. It is this decision that this Court is being asked to review. As the following discussion demonstrates, no such review is warranted.

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REASONS FOR DENYING THE WRIT

The result at trial in this case, and the decision of the Court of Appeals affirming that result, are largely a product of the particular facts presented at trial. The decision of the Court of Appeals is legally correct and is applicable only to this case. It neither concerns any significant public issues nor announces any rule of law that would have precedential impact in any other proceeding. Moreover, even within the factual setting to which it applies, the reasoning of the Court of Appeals is not in conflict with decisions of any other Circuit Court of Appeals or of this Court. The Court of Appeals merely analyzed the evidence of anticompetitive conduct presented at trial and concluded that that evidence was sufficient to establish an abuse of monopoly power. No aspect of that decision warrants certiorari review.

I. The Decision Of The Court Of Appeals Is Merely A Review Of The Sufficiency Of The Evidence Presented And Neither Announces The Rule Nor Has The Impact That Ski Co. Contends.

The first contention Ski Co. advances as a reason for granting certiorari is premised on Ski Co.'s pronouncement that the Court of Appeals has created a new duty to cooperate under which "a large firm's refusal to yield to its smaller competitor's demand for joint marketing" violates the Sherman Act. Petition at 6-7. From this, Ski

Co. argues that the resulting "court imposed cartelization" is inimical to, and a dangerous precedent for, antitrust policy generally and is harmful to the competitive process in Aspen. The fundamental disingenuousness of this argument is that it ignores both the context and the specifics of the Decision. The Court of Appeals plainly did not decide what Ski Co. says it did.

As mentioned, Ski Co.'s appeal with respect to monopolization was confined to an attack upon the sufficiency of the evidence to support the general verdict on that issue. In making that attack Ski Co. abandoned the business justification defense for its conduct, which it had vigorously advanced at trial. Instead its appellate argument was that its intent in engaging in the conduct Highlands challenged was irrelevant and that the verdict should be set aside because none of the conduct at issue was anticompetitive.

It was in this context that the Court of Appeals' decision arose. In examining the issue of monopolization, the Court of Appeals *repeatedly* noted that it was considering all the evidence relating to that charge:

> We must decide whether under the truly applicable law there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, *together with defendant's other conduct,* constituted monopolization in violation of § 2 as a refusal to cooperate, sometimes referred to as a refusal to deal.

Appendix to Petition, p. 15a (emphasis added). See also Appendix to Petition, p. 23a. This consideration of all the evidence as a whole was entirely appropriate. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

Therefore, the decision does not stand for the broad proposition suggested by Ski Co.: that the mere refusal of

a large firm to yield to its smaller competitor's demand for joint marketing constitutes illegal monopolization. Ski Co. did not just "decline to market its services jointly" with Highlands (Petition at 5). Rather, without business justification, it engaged in a *series* of exclusionary activities: (1) Ski Co. was perfectly willing to continue participation in the four-area ticket if Highlands accepted a condition that fixed Highlands' share of the revenues at a level below what skier usage at Highlands would have justified and that stifled competition between the parties; see Appendix to Petition, pp. 29a-30a; (2) Ski Co. refused to sell to Highlands daily lift tickets or accept the vouchers Highlands attempted to use in the Adventure Pack; (3) Ski Co.'s increase to a twenty-two dollar daily lift ticket price made sale of the Adventure Pack impossible; (4) Ski Co. refused to consider a coupon system for continuation of the four-area ticket, despite its contemporaneous participation in a coupon-based, four-area ticket and joint marketing system with its equally-sized rivals in Summit County, Colorado; and (5) finally, Ski Co. engaged in an advertising effort that effectively removed Highlands from the map and operated to convince the newcomer to Aspen that the resort consisted of three rather than four mountains.

The Court of Appeals reviewed, and based its decision on, all this evidence. Its affirmance of the verdict thus stands for no more than the proposition that a jury can properly find a defendant that has committed all the acts Ski Co. engaged in here guilty of monopolization. Such a fact-sensitive decision has neither the policy impact nor the precedential implications that Ski Co. contends.[6]

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[6] In addition to being based upon a gross mischaracterization of what the Court of Appeals actually decided, Ski Co.'s

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II. In Reviewing The Sufficiency Of The Evidence, The Court Of Appeals Correctly Applied Existing Law.

As with the facts, Ski Co. also distorts the manner in which the legal analysis employed by the Court of Appeals took place. In examining Ski Co.'s series of activities, the Court of Appeals merely used an established analytical framework comprised of the two related theoretical approaches—essential facilities and anticompetitive intent—employed in *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971) *aff'd in relevant part*, 410 U.S. 366 (1973), and a host of other monopolization cases. This reference to the theoretical bases by which a refusal to cooperate could constitute monopolization was necessary because Ski Co. had argued on appeal that as a matter of law "even a monopolist has no duty to cooperate with a competitor." Brief of Defendant-Appellant, p. 42.[7] All that the Court of Appeals did in response to

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argument, at page 8 of the Petition, bemoaning the effects of the decision on competition in Aspen, suffers from several other infirmities. First, Ski Co.'s continuing obligations with respect to cooperation with Highlands in making a four-mountain ticket available were imposed by the injunction entered by the District Court. Ski Co. did not challenge either the general appropriateness or the specific terms of that injunction in its appeal. Second, Ski Co.'s lament is based on hypotheses that have absolutely no support in the record that was before the District Court or the Court of Appeals. Finally, the evidence that was introduced at trial concerning the state of competition between the parties during the 1970's, when the four-area ticket was being sold, indicated that competition to attract skiers, once they were in Aspen, to ski at the respective parties' areas was vigorous. After 1977, when Ski Co. began its exclusionary conduct, competition diminished.

[7] Despite its acknowledgement, at page 6 of the Petition, that unilateral refusals to deal by monopolists are proscribed in several situations, Ski Co. argues even more vigorously here that there can never, under any circumstances, be a "duty to cooperate," and that the imposition of such a duty plays havoc

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this argument was to look to two analytical models under which such a duty does indeed exist and conclude that the evidence presented here was sufficiently analogous to an essential facilities situation and sufficiently indicative of improper intent to uphold the verdict. *"On this record* we conclude that both groups of cases apply and support the judgment here." Appendix to Petition, p. 19a (emphasis added).[8]

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with antitrust policy. Ski Co.'s insistence on this point is inappropriate for several reasons. First, it overlooks the rationale of, and the relief decreed in, this Court's decision in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). There, the defendants' control over an essential facility created a duty to cooperate, as evidenced by the decree requiring the terminal association to admit to its joint operating and marketing mechanism any competing railroad that needed to use the facilities. *Accord, Associated Press v. United States*, 326 U.S. 1 (1945). Second, as already noted, the Court of Appeals did not premise liability on the mere failure to cooperate in "joint marketing." Third, while Ski Co. can now apparently express concern over the parade of horribles that might emanate from "joint marketing," such policy concerns did not deter its willingness to continue a four-area ticket in Aspen in 1977 and 1978, so long as it received more than its fair share of the revenues, or its willingness to enhance its competitive position by participating in a "joint marketing" program in Summit County.

[8] Here again the precedential impact of the court's decision is limited to the particular facts and context of this case:

> The substance of an essential facilities case was made. We must remember that this issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment n.o.v. In that connection we must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. [Citations omitted.] We hold that *in these circumstances* there was sufficient proof to sustain the verdict on the basis of a duty to deal or cooperate, and wrongful refusal to deal.

Appendix to Petition, p. 21a (emphasis added).

Under these circumstances, the decision of the Court of Appeals is utterly lacking in the far-reaching implications upon

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Ski Co. faults this process and contends that in reaching its affirmance of the jury's verdict the Court of Appeals distorted the essential facilities doctrine and "confounded any meaningful analysis of intent and conduct" in the realm of monopolization. However, when the decision of the Court of Appeals is objectively examined, without the distraction of what Ski Co. attempts to read into the decision, in connection with the evidence that the jury must be presumed to have accepted, there is nothing distorted, confusing, or unprecedented about it. The court's application of the essential facilities and anticompetitive intent doctrines was entirely consistent with the body of law that has developed in these areas.

A. Essential Facilities

Ski Co.'s criticism of the Court of Appeals with regard to the essential facilities doctrine centers upon the court's alleged failure either to determine the essentiality of the facilities or to require the existence of some controlled input from one market that was being denied to a competitor for use in delivering a product or service in some vertically related market.[9] Neither contention is worthy of consideration by this Court.

The Court of Appeals properly determined that there is an essential facility involved here—multi-mountain ca-

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the law of monopolization that Ski Co. attributes to it and upon which Ski Co. premises its request for certiorari review. This Court does not, and need not, "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

[9] Ski Co. apparently does acknowledge that the essential facilities doctrine exists and can be, in appropriate circumstances, a proper test for determining illegal monopolization. Also, Ski Co. appears to accept the four-factor test adopted by the Court of Appeals as the determinant for liability.

pacity, *i.e.*, the ability to offer skiers access to more than one mountain during their skiing vacation. The vital importance of this capacity was demonstrated by lay and expert testimony concerning its attractiveness to Aspen skiers, by historical evidence of the use and popularity of various tickets, and by the efforts of Ski Co. itself to acquire and exploit multi-mountain capacity in Aspen, and participate in multi-mountain marketing in Summit County, Colorado. As the Court of Appeals recognized:

> By refusing to cooperate with plaintiff, defendant became the only business in Aspen that could offer a multi-day multi-mountain skiing experience. This is an important factor to attract Aspen skiers who seek variety.

Appendix to Petition, p. 22a.

> If defendant refuses to market a multi-day multi-mountain ticket with plaintiff, plaintiff cannot compete in the market for such tickets.

Appendix to Petition, pp. 20a-21a.

It should be, and was to the Court of Appeals, obvious that Highlands cannot sell multi-mountain tickets without multi-mountain capacity, or reasonable access to such capacity. Just as access to a produce market may be essential to a fruit wholesaler, *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), or access to transport facilities may be essential for a producer of natural gas, *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1308 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), access to multi-mountain capacity is clearly essential to compete in the market for multi-area lift tickets.

The test that Ski Co. proposes for determining whether a facility is "essential"—what effect would there be if the facility were to disappear—is simply not consistent with the cases that have defined essential facilities. None of the cases considering essential facilities have required the showing [illegible]ki Co. suggests, *i.e.*, for a facility to be essential it must be shown that if it were eliminated a plaintiff's entry or survival in the business would be impossible.[10]

To the contrary, there is an established test for defining essential facilities and that test was applied here. In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the court held that for a facility to be deemed essential it "need not be indispensable; it is sufficient if duplication . . . would be economically infeasible and if denial of its use inflicts a severe handicap on [competitors]." This same test for essentiality was employed in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) where the court held that the evidence established that local interconnection facilities were essential

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10 Nor is such a situation a necessary, albiet unstated, component of those cases. Indeed, if the produce warehouse and market in *Gamco* had disappeared, the plaintiff still could have carried on its business; it and the defendants merely would have had equal but more limited access and appeal for their customers. Similarly, if Ski Co.'s three mountains were to become one, multi-mountain tickets would cease to exist and multi-mountain capacity would no longer be a factor in the marketplace, leaving the parties to compete on the basis of the respective appeal of their individual mountain. However, until such a geologic rearrangement occurs, the fact remains that Ski Co. has monopoly power and controls multi-mountain capacity, which continues to be the dominant factor in the market for multi-mountain tickets.

but failed to establish that multi-point interconnection was essential, because there was no showing that "duplication of Bell's intercity lines was economically infeasible or that the denial of access inflicted a severe handicap on market entrants." *Id.* at 1148.[11] In deciding that Highlands could not feasibly develop another ski mountain in Aspen and could not compete in Aspen without multi-mountain capacity, the Court of Appeals correctly applied exactly the same definition of an essential facility. It is manifestly unnecessary for this Court to intervene to refine that definitional process.

Ski Co. next argues that this case is anomalous and the application of the essential facilities doctrine heretical because it differs from "every 'bottleneck' or 'essential facilities' case decided to date [in all of which the] plaintiff sought to buy some input from the defendant." Petition at 15, fn. 17. A review of the record amply demonstrates that no such difference exists.

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11 It should be noted that Ski Co.'s discussion of the *MCI* multi-point issue, Petition, p.13, fn.16, radically misstates the holding of the Seventh Circuit Court of Appeals. The court did not reject a bottleneck theory with respect to multi-point connections because of the absence of a "second market," as Ski Co. maintains. Rather, the court held there had been a failure to prove that the facilities in question were essential. Moreover, the court did not "squarely" hold "that AT&T's refusal to share its long distance network with its long distance competitors could not be a basis for liability under §2." To the contrary, after finding the bottleneck theory inapplicable, the court went on to examine the refusal under the anticompetitive intent test and found that AT&T could be liable if the FCC had authorized such interconnections. However, the court held that the conditions of regulatory uncertainty prevailing at the time made it impossible to conclude that AT&T was motivated by anticompetitive intent rather than legitimate business purposes, thus precluding liability under the evidence presented.

Highlands seeks to sell multi-mountain tickets in a market where consumers prefer such tickets.[12] To do that, Highlands has sought to purchase from Ski Co. access to multi-mountain capacity, over which Ski Co. has monopoly control, and to include that access in a product, multi-mountain lift tickets, that Highlands seeks to sell to skiers. Prior to Ski Co.'s termination of its participation in the four-area ticket, that purchase of input was accomplished by Highlands paying Ski Co., through a division of revenues, for each day the purchaser of a four-area ticket skied at one of the Ski Co. mountains. After termination of the four-area ticket, Highlands attempted to purchase such access by including in its Adventure Pack lift tickets purchased from Ski Co. or cash-equivalent vouchers that skiers could use to buy lift tickets at Ski Co. mountains.[13] In each instance, Ski Co. refused to sell this essential input to Highlands. For the Court of Appeals to have found the "substance of an essential facilities case" upon such

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[12] The jury found that the relevant product submarket was downhill skiing services in Aspen, including multi-area, multi-day lift tickets. The Court of Appeals held that the instruction giving rise to this finding was not clearly erroneous and affirmed it. Thus, one of the products within the relevant submarket was multi-mountain tickets. This case definitely does contain a vertical aspect, in that one of the products in the relevant submarket, multi-mountain tickets, is composed of and made up from constituent elements—access to skiing services at more than one mountain in the area. Ski Co. was the only supplier in the market that could provide this constituent element.

[13] Ski Co.'s repeated insistence that Highlands is seeking to borrow its higher quality "output" or piggyback upon its more desirable service, rather than purchase some needed "input," totally ignores all this evidence of Highlands' efforts to buy access, at Ski Co.'s full price, and ignores Ski Co.'s willingness to sell access, although only on anticompetitive terms, in 1977 and 1978.

facts is consistent with the traditionally vertical orientation of such cases and constitutes absolutely no "twisting of the essential facilities doctrine." Just as access to terminal and bridging facilities was a necessary component for the provision of through railroad services in *United States v. Terminal Railroad Association,* 224 U.S. 383 (1912), access to Ski Co.'s multi-mountain capacity was a necessary component for the marketing of multi-mountain tickets. The Court of Appeals recognized this analogy and properly used it to sustain the finding of monopolization. The decision made by the Court of Appeals on the record before it falls squarely within the established boundaries of the doctrine. No new demarcation by this Court is needed.

B. Intent

With respect to the other, alternative, basis for the Court of Appeals' decision—anticompetitive intent—Ski Co. waxes astronomical in arguing that the court has fallen into some "black hole" of confusion regarding the proper role of intent analysis in a refusal to deal case and that intervention by this Court is essential to restore the law to its proper orbit. Again, Ski Co. has misconstrued the Court of Appeals' decision and its relation to the applicable law in this area.

The focus upon intent in determining whether a unilateral refusal to deal constitutes unlawful monopolization finds its origin in this Court's decision in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927), and has been expressed in a long line of cases holding that a monoplist's refusal to deal is unlawful if it does not arise from legitimate business purposes. *See, e.g., Home Place-*

ment Service, Inc. v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Mid-Texas Communications, Inc. v. AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980). The rationale of such cases is that it is appropriate to infer anticompetitive intent from conduct that has no business justification. Some of these same cases, and others, *e.g., Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979), employ, as an alternative, a focus on the impact of a defendant's conduct, reasoning that pursuit of anticompetitive acts that are unreasonably restrictive of competition is a clear indication that a defendant intends to create or perpetuate monopoly power. Regardless of the focus, the touchstone of liability is a defendant's willful, *i.e.*, intentional, acquisition or maintenance of monopoly power, as distinguished from growth or development on account of conduct that is honestly industrial. *Cf. United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Both focuses are directed toward answering the same question: Did the defendant intend to harm competition or was he merely pursuing legitimate business aims? Whichever way the question is framed the answer will be the same because conduct engaged in for legitimate business purposes does not harm competition, as opposed to individual competitors. *Cf. Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). If either line of inquiry inevitably leads to the same result—proper resolution of the willfulness issue framed by this Court in *Grinnell* as an essential element

of the offense of monopolization—it should matter little to this Court that the lower courts have employed varying focuses to reach that end.[14]

Moreover, even if there is a need to orient the focus more upon the impact or effect of a defendant's conduct, beyond that arising from the refusal to deal itself, rather than his motive, as Ski Co. argues, this case does not demonstrate any such need and would be an inappropriate vehicle for pursuing such an attempted reorientation. In its decision here on anticompetitive intent, the Court of Appeals did not base its holding on evidence of subjective states of mind, or even on the mere lack of any legitimate business justification for Ski Co.'s conduct, as indicative of Ski Co.'s purpose to create or maintain a monopoly. Indeed, had the court chosen such a focus, no further inquiry would have been needed because on appeal Ski Co.

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[14] Ski Co.'s attempt to unearth some conflict amongst the circuits and some lower court confusion regarding the intent issue is specious. The selective lifting of pieces of verbiage from opinions covering differing factual settings does not demonstrate either conflict or confusion—except on the part of Ski Co., in that its discussion of intent roams across the whole field of monopolization rather than focusing on the relevance of intent in a refusal to deal context. None of the cases to which Ski Co. refers shows any conflict on the issue that was before the Court of Appeals: When can a monopolist's refusal to deal with a competitor constitute a violation of § 2? As the decision in *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 860 (6th Cir. 1979), recognizes, the exclusionary impact of the conduct involved in such a situation, which Ski Co. insists should be the predicate for liability, is manifest from the refusal to deal itself. With the existence of exclusionary conduct thus already established, each one of the refusal to deal cases to which Ski Co. cites rests its determination concerning liability upon a factual inquiry regarding the setting in which the refusal took place and whether some legitimate business reason for the refusal existed. That is also what the Court of Appeals did here.

had to concede that it had failed to prove any business justification for its refusal to deal. Instead, the Court of Appeals did exactly what Ski Co. argues that this Court should require. It examined Ski Co.'s refusal to deal along with its other conduct and weighed the impact of that conduct on the marketplace. In its decision on this issue, Appendix to Petition at pp. 22a-23a, it concluded that Ski Co.'s overall pattern of conduct: (1) was exclusionary—it "became the only business in Aspen that could offer a multi-day multi-mountain skiing experience"; (2) frustrated consumers; (3) was unreasonable; and (4) resulted in higher prices for single-day lift tickets. Such conduct was injurious not just to Highlands but to the entire competitive process. The court properly held that such evidence amply showed Ski Co.'s "intent to create or maintain a monoply." That holding is neither inconsistent with, nor contributory to any confusion regarding, the manner in which the lower courts have treated the issue of intent in the context of refusals to deal. Even if any clarification on this issue is needed in the abstract, there is certainly no need of it here.

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CONCLUSION

The decision of the Court of Appeals that the evidence presented at trial was sufficient to support the verdict has no broad precedential impact. Nor does the decision represent any misapplication of established law or demonstrate any confusion regarding unsettled law. The decision was correct. For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 25th day of October, 1984.

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
TUCKER K. TRAUTMAN
JOHN H. EVANS
OWEN C. ROUSE

Attorneys for Respondent

1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

APPENDIX A

The District Court's monopolization instruction was: On the other hand, if you do find monopoly power, you must consider the second essential element: Whether [Ski Co.]willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes.

"Wilfully" as used in these instructions means acting knowingly and deliberately, but it does not mean that [Ski Co.] must have specifically intended to achieve or maintain monopoly power.

In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization.

For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which pos-

sesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.

To sum up, you must determine whether [Ski Co.] gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or submarket.

Conduct which is directed at injuring competitors may be classified either as exclusionary conduct, which is conduct aimed at actual elimination of competition or at preventing it from coming into being, or as anti-competitive conduct, which is action that restricts, interferes with, impairs, or frustrates the efforts of other firms to compete in the relevant market. Although these forms of conduct may be slightly different, they are not absolutely distinct. Therefore, I will use either term, exclusionary or anti-competitive, to refer to the types of conduct which Aspen

Highlands must have proved in order to establish the second essential element on its charge of monopolization.

It can sometimes be difficult to determine the primary quality or nature of an act so as to classify it as honestly industrial or as exclusionary or anti-competitive. Nonetheless—nevertheless, you must decide. Given conduct may both help customers and hurt competitors. If this seems to be the case to you, you must ask yourselves whether it hurts competitors because it appeals to consumers. That is, was the harm to a competitor caused by consumers' preference for Defendants' products? If so, the kind of conduct involved is not exclusionary or anti-competitive because the goal of Section 2 is to protect competition itself rather than a particular competitor's right to thrive.

If a business does poorly because it is faced with vigorous competition, this is not unlawful. In addition, so long as a company which possesses monopoly power acts reasonably, it is not necessary that the company adopt the least restrictive alternative available. It is the choice of an unreasonable alternative, not the failure to choose the least restrictive alternative, that may lead to liability.

However, if the harm, to a competitor is caused by something other than Defendants' success in competing on the merits of its products and operations—if the harm is caused primarily or substantially by the defendants' deliberate efforts to injure or block competition—then you may find that the conduct was anti-competitive. Such conduct, whether to obtain monopoly power in the first place or to hold on to it or make use of it establishes the second element of the offense of monopolization of the particular market involved.

You need not find that monopoly power was gained or maintained or used solely in anti-competitive ways in order to establish this element of monopolization. However, a preponderance of the evidence must show that the anti-competitive conduct played a significant or substantial role. An isolated or trivial episode will not make [Ski Co.] liable for monopolization if monopoly power was in other respects gained, retained, and employed in a fashion that is honestly industrial rather than anti-competitive.

On the other hand, Aspen Highlands is not required to prove every one of its allegations about anti-competitive conduct. Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence. In the end, you must decide whether Aspen Highlands has carried its burden of proving not merely an isolated or occasional act but a substantial or significant amount of conduct that was exclusionary or anti-competitive in nature.

If you find that Aspen Highlands has not met this burden, then your verdict on the claim of monopolization must be for Defendants.

APPENDIX B

Civil Action No. 79-Z-1012

Defendants' Requested Jury Instruction No. 21

A monopolist who refuses to enter into a joint operating agreement with a competitor or who otherwise refuses to deal with a competitor in some manner, does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to be a monopolist in a relevant market, has not violated the law.

Mid-Texas Communications v. American Tel & Tel Co., 615 F.2d 1372, 1387 (5th Cir. 1980); *Byars v. Bluff City New* (sic) *Co., Inc.*, 609 F.2d 843 (6th Cir. 1979); *International Railways of Central America v. United Brands*, 532 F.2d 231 (2d Cir. 1976).